

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Wake Robin Associates Limited Partnership
Wake Robin Corporation, and **Dunbar** Bostwick
Land Use Permit Application #4C0814-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal of a permit issued for a continuing care retirement facility with respect to the following criteria of 10 V.S.A. § 6086(a): 8 (aesthetics, scenic and natural beauty), 9(F) (energy conservation), 9(K) (impact on public facilities), and 10 (conformance with local and regional plans). As is explained below, the Environmental Board concludes that the proposed project complies with the criteria at issue as long as various conditions are imposed, including requirements to ensure reduced visibility of the project generally and its community center specifically, and of night-time lights from its employee parking lot and community and health centers.

I. Summary of Proceedings

On July 20, 1990, the District #4 Environmental Commission issued Land Use Permit #4C0814, which authorizes the construction of Phase I of a continuing care retirement community in the Town of Shelburne, Vermont. The approved project consists of 175 independent living units in five cottage clusters and two apartment buildings, a 26,500 square foot community center, a 54,220 square foot health center, a 1,400 square foot maintenance building, covered walkways and tennis courts. The project will be located on a 136.4 acre parcel of land located off Bostwick Road in Shelburne, Vermont.

On August 17, 1990, Ellen Jansen, James and Alice Murdoch, Suki **Rubin**, Peter and Deborah Swift, and Lola Van Wagenen (the Appellants) filed an appeal with the Board with respect to 10 V.S.A. § 6086(a)(1) (air pollution-noise), (8) (scenic and natural beauty, aesthetics), (8)(A) (wildlife), (9)(C) (forestry soils), (9)(F) (energy conservation), (9)(K) (impact on public facilities), and (10) (conformance with local or regional plans).

On August 31, 1990, the Applicants filed a cross-appeal and a motion to dismiss. The cross-appeal challenged various grants of party status made by the District Commission to the Appellants. The motion to dismiss challenged the Appellants' appeals with respect to Criteria 8(A), 9(C) and 10.

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On September 12, 1990, Acting Chair Stephen Reynes convened a prehearing conference in Essex Junction with the Applicants and the Appellants participating. On September 20, the Board issued a prehearing conference report.

Following various submissions by the parties, the Board issued a memorandum of decision on November 27, 1990. In the decision, the Board limited the scope of the appeal to Criteria 8, 9(F), 9(K), and 10.

Subsequently, the parties filed prefiled testimony, rebuttal testimony, and prefiled evidentiary objections. The Board convened public hearings on December 19 and 20, 1990, and February 21, 1991, with the following parties participating:

The Applicants by Richard Spokes, Esq.
The Appellants by Liam L. Murphy, Esq.

After taking a site visit and hearing testimony, the Board recessed the matter pending submission of proposed findings of fact and conclusions of law, review of the record, deliberation, and decision.

On March 13, 1991, the Applicants and the Appellants submitted proposed findings of fact, conclusions of law and order. The Board deliberated on March 21, April 18, and June 6, 10, 27, and 28. On July 3, the Board issued a memorandum informing parties that the Board was deadlocked, that other members would be asked to serve, and that the Board would convene oral argument on the issues which were the source of the deadlock. The Board also issued a proposed decision and dissenting opinion. Written responses to the proposed decision were filed on July 25 by the Applicants, the Appellants, and the Town of Shelburne. The Board convened argument on August 1, with the following parties participating:

The Applicants by Richard Spokes, Esq.
The Appellants by Liam L. Murphy, Esq.
The Town of Shelburne by Adam Bridge, Esq.

The Board deliberated on August 1 and 9. This matter is now ready for decision. To the extent any proposed findings and conclusions are incorporated below, they are granted; otherwise, they are denied.

the south by land owned by the Shelburne Partnership. The Partnership has received approval for a residential subdivision on that land, which has not yet been constructed. The project site is approximately one mile from Route 7 to the east, the Shelburne Museum, and the Vermont Morgan Horse complex.

3. The context of the project area is defined by a ridge line which separates more developed areas east of the ridge line and near Route 7 from the area west of the ridge line, which is of rural agricultural character with low density **residential** housing. The area east of the ridge line has recently experienced increased suburbanization, and the area west of the ridge line remains less developed. The area west of the ridge contains a landscape of rolling meadows, Lake Champlain, and glimpses of houses nestled in stands of trees by the lake. The ridge runs alongside all but the extreme south of Lake Champlain's Vermont shore. The ridge line defines the western edge of the lakeshore valley. The land slopes down from the project site to the lake.
4. The structures within a mile and a half radius of the project site west of the ridge consist of mostly farm buildings and single-family two-story houses. The scale and mass of the proposed buildings are of a different magnitude from most of the buildings within that radius. The mass of the community center will be approximately 840,000 cubic feet, the health center will be approximately **2,000,000** cubic feet, the apartments complexes each will be approximately **2,750,000** cubic feet, and the cottage clusters each will be approximately 150,000 cubic feet. By comparison, Appellant Murdoch's house, which is typical of the area, is 40,000 cubic feet.
5. With the exception of an approximately **12-acre** open meadow bordering Bostwick Road, the site is a heavily wooded hillside rising 200 feet in elevation from the railroad to the top of the hill at the site's eastern boundary. The site is located within what is known as the Bostwick-Clark Woods, which is part of the **ridge line** described above.

6. The project will be **constructed** in the southeast quarter of the 136-acre parcel, with approximately 34 acres of the site being disturbed. The disturbed area includes a main portion containing all of the buildings and an access road and clearing for drainage and sewer lines. Approximately 90 acres of the site will remain wooded and subject to a Forest Management Plan (Exhibits #W30 and #W31). An existing **12-acre** meadow fronting on Bostwick Road will remain undisturbed except for the access road which will run through a portion of the meadow which borders the remaining wooded part of the parcel.
 7. The project site slopes downward toward the west. The site includes two plateaus which are separated by a relatively short, steep slope. The project buildings will be situated on the two plateaus. Trees on the upper plateau will screen the project from view from the east and will serve as a natural background to the project for viewers from the west. In this regard, the most important trees on the upper plateau are those along the southeastern border of the project area.
 - a. All buildings will consist of wood frame structures. Their style and design are patterned after buildings at Shelburne Farms. Exterior building colors will be browns and tans, with dark brown or dark grey roofs.
 9. The proposed maximum height of the *major* buildings from finished grade are: community center - 45 feet; Butternut apartments - 54 feet; Hornbeam apartments - 46 feet; and health center - 45.5 feet. A cupola will rise another 12 feet above the roof on the community center building. The grade to roof height of the apartment buildings will be approximately 44 feet, and the cottage clusters will extend approximately 15 feet above grade. The community and health center buildings will be built close to the western edge of the project area, which is the side closest to Lake Champlain.
 10. A water tank serving the project will be located on the adjoining Holmberg property, and will be 50 feet in diameter and 15 feet high. The tank will be light brown in color.
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11. Parking lots will be illuminated by 100-watt metal halide lamps in shoebox fixtures on 16-foot poles. The fixtures are designed to distribute their light away from off-site public roadways.
 12. Parking lots will be located on the eastern side of buildings, with the exception of the employee parking lot. Lighting fixtures in the employee parking lot will be tilted 10 degrees. In this way, the Applicants intend to reduce the visibility of lights at the employee parking lot. However, there will still be nine 16-foot tall lights in that parking lot, which will be located just west of the health center. The lot is located very close to the western border of the disturbed area. Light from the parking lot will exacerbate the community and health center lighting which will be visible from the west (see Finding 30, below)..
 13. Lighting fixtures for decks and balconies will be louvered and directed onto the walking surfaces. The fixtures will be mounted between 18 inches and 24 inches above the deck or balcony, and will use seven watt fluorescent lamps. These lights will be controlled by residents.
 14. Incandescent wall-mounted fixtures will be located by the individual garage doors. The garage lights are hidden behind the cottages and are directed downward.
 15. The covered walkway lights will be shielded because they will be mounted inside the roof area and directed downward. The level of light will be controlled by dimmers. Timers will be used. The community center will often be lit during the night because it will be the community's primary meeting and eating place. The health center also often will be lit during the night because it is a part of the project which will be used by the whole community for health services.
 16. Exhibits #W6, W30, and W31 show *interior* and perimeter tree stands to be preserved. Prior to any construction activities, only a few marginally healthy trees will be removed from those interior and perimeter stands. Before construction COM-
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mences, a surveyor will mark an initial clearing line 10 feet beyond the limits of grading. Adjustments will be made in the clearing line to preserve trees within the initial line based on the condition of the crowns of individual trees, their overall vigor, rooting depth and spread, and the degree of construction to occur within the vicinity. Snow fencing will be erected along the final clearing line to prevent construction equipment from encroaching onto the protected areas. All trees within the construction zone shown on Exhibit #W6 will be removed unless they are within the interior stands. Exhibit #W6 is a Site and Grading Plan prepared by T. J. Boyle and Associates, dated May 23, 1989, and last revised November 19, 1990. Exhibit #W30 is entitled Forest Management Plan for Wake Robin Property (January 1, 1989), prepared by Upland Resource Group, Inc. Exhibit #W31 is entitled Addendum, Wake Robin Forest Management Plan.

17. Heavy equipment may be used for installation of sewer lines and a stormwater discharge system. Trees will be cut for the construction of sewer lines and the stormwater system (see Exhibit #W5, entitled Wake Robin, Overall Site Plan, prepared by T. J. Boyle and Associates, dated November 20, 1989, last revised November 20, 1990). The preconstruction procedures delineated in Finding 16, above, will also be followed in establishing working areas for the installation of sewer lines and storm drainage swales outside of the construction zone. These precautions are designed to minimize breaks in the tree canopy. To further reduce off-site visibility of any cleared areas, the drainage swales will be curved, and their width will be narrowed on the steeper slopes, such as those in front of the community center. Sewer lines will generally follow contours. In several places, however, the lines will not follow contours and will drop down short, steep slopes. These areas will form breaks in the forest stands which will be noticeable off-site during months when foliage is off the trees.
18. The Applicants' plans include walking trails for the residents. Only small understory trees will be cut for the trails, and the canopy will not be affected.

19. Vista pruning is also proposed once construction is complete. The pruning will offer views for the residents from selected vantage points such as the community center building and will be accomplished under the direction of the county forester, the Applicants' forester and landscape architect, and representatives from the Town of Shelburne. No plan showing areas of vista pruning has been submitted.
 20. The Applicants will manage the forest on the site which will surround the proposed project. This forest is divided into various stands (see Exhibit #W30 and attached forest management map.) A variety of age classes is represented in each stand. Due to age and health, significant losses of white ash and some loss of beech can be expected. White ash accounts for four percent of Stand 1, five percent of Stand 2, and six percent of Stand 3, and healthy species such as sugar maple, oak, hickory and hop hornbeam comprise 75 percent of Stands 1 and 2 and 66 percent of Stand 3. Overstory trees in these three stands are as high as 75 feet. One of the objectives of the Applicants' forest management plan is to improve wildlife habitat by maintaining a vegetative diversity. Another goal is to maintain a series of forest stands around the project to screen it from view. Of the total wooded acreage on-site, the proposed project will disturb approximately 34 acres, and preserve and maintain 90 acres.
 21. The Applicants have developed a planting plan (Exhibit #W16, entitled Overall Planting Plan, prepared by T. J. Boyle and Associates, last revised November 20, 1990). Evergreens will be used to fill in and expand the interior tree stands referenced in Finding 16, above, to cover exposed cut and fill slopes, and to screen the employee parking lot. Twelve-foot tall hardwood trees will be planted in the most visually sensitive portions of the drainage swales.
 22. A **clearcut** of trees can affect the microclimate of the surrounding woodlands for up to 100 feet around the cut. This change in microclimate may
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II. Issues in the Appeal

1. Whether, pursuant to 10 V.S.A. § 6086(a)(8) **(Criterion 8)** the visual and noise impacts of the proposed project will have an undue adverse effect on aesthetics or scenic or natural beauty.
2. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(F) **(Criterion 9(F))**, the solar orientation of the proposed project reflects the principles of energy conservation.
3. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K) **(Criterion 9(K))**, the visual impacts of the proposed project will unnecessarily or unreasonably endanger the public or quasi-public investment in Lake Champlain or the Shelburne Town Beach, or will materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of, or access to, Lake Champlain or the Town Beach.
4. Whether, pursuant to 10 V.S.A. § 6086(a)(10) **(Criterion 10)**, the proposed project conforms to the applicable **local** and regional plans with respect to aesthetics and scenic beauty, solar orientation, and visual impacts on users of Lake Champlain and the Shelburne Town Beach.

III. Findings of Fact

1. The Applicants propose to construct Phase I of a continuing care retirement community consisting of 175 independent living units in five cottage clusters and two apartment buildings, a 26,500 square foot community center, a 54,220 square foot health center, a 1,400 square foot maintenance building, covered walkways, and tennis courts, on a 136.4 acre parcel of land located off Bostwick Road in the Town of Shelburne. The cottage clusters include 61 cottages and will total approximately 72,384 square feet. The apartment buildings will be 62,500 square feet each. Including the accessory buildings, the total square footage of project buildings will be approximately 311,000 square feet.
2. The proposed project site is bordered on the north by Bostwick Road and property owned by **Meach** Cove Associates, on the west by the Vermont Railway, on the east by lands presently being developed by Holmberg, Inc. as a residential subdivision, and on

accelerate any decline in the adjacent trees which may already be occurring as the result of age or health.

23. Trees immediately adjacent to any site disturbance are at great risk of injury and death. Construction activities place stress on trees and attention to root protection is critical if trees adjacent to site disturbance are to survive.
 24. In order for trees to be adequately protected during construction, a snow fence must *be* placed at least 10 feet outside the canopy of the trees to be protected. The Applicants' site plans show a snow fence inside the canopy of the trees to be saved (see Exhibit #W6). Thus, the Applicants will be conducting construction activities, including operating heavy equipment, inside the canopy of trees closest to the proposed project. On the west of the project, the trees closest to the proposed project will be those at the highest elevation within tree stands which will slope downward from the proposed project. The trees most likely to be affected are therefore the trees which will provide the best screening of the project from view.
 25. If the forest management plan is successful, building heights will generally be lower than tree heights when observed from off-site viewing locations. The tops of some buildings will be visible off-site, especially during those months when foliage is off the trees. In particular, a significant portion of the top of the community center, including its cupola, will be visible from the west. The center is set back approximately 100 to 150 feet from the proposed limit of construction. An open lawn is proposed to be created immediately west of the center. The trees to the west of the center will not sufficiently screen it because they will be at a lower elevation than the center, will be separated from it by the width of the lawn, and may suffer from dieback due to the placement of the snow fence under the canopy. As shown on Exhibit #W6, a sewer line is proposed to cross the lawn between those trees and the center. If clearing of trees were prohibited west of that sewer line, better screening of the center would occur.
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26. Appellant Murdoch's house is approximately 4,700 feet in a direct line from the project site. Views are blocked by intervening farm buildings and vegetation of the east side of Beach Road. The other Appellants reside approximately 5,800 feet from the project site. The project site is not visible from the homes of the other Appellants.
 27. The Town Beach is located near Lake Champlaina little over a mile west of the project site. The nearest shore of Lake Champlain is approximately 5,400 feet in a direct line west of the project. The upper portions of the project site are visible from the lake starting at approximately $\frac{1}{4}$ of a mile from shore. When viewed from the lake, the site is part of a continuous ridge line. Views of the project from the lake and the beach will be mitigated by distance and substantial stands of trees.
 28. The proposed project is expected to create a net increase in population of 186 residents and 15 staff persons in its first year, for a total of 201 persons. The proposed community in the second year will grow by an additional 76 persons. The expected population of Shelburne without the proposed community at that time will be 6,302 persons and thus the proposed project will represent an increase of 4.2% of the Shelburne population in the first two years. Dividing the expected Town population by the 14,272 acres of land within the Town, the Town's population density will be approximately one half of a person per acre in two years. Based on the 136-acre size of the project site, the proposed project's population density will be approximately two people per acre two years after it is built.
 29. The Town zoning regulations provide for residential development at a maximum of one unit for each ten acres of land. The Holmberg development on adjacent lands on the east side of the ridge and the Shelburne Partnership lands south of the proposed project are based on a density of one unit per ten acres. By comparison, based upon the entire 136 acre parcel, the proposed project will be at a density of 1.5 units per acre.
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30. Illumination from windows at the project, either at night or reflecting from the setting sun, will be significantly reduced by the intervening tree stems and crowns which will be preserved as a result of the Applicants' forest management plan. This reduction will be at its greatest during summer because of tree foliage. In the absence of foliage, glow from the employee parking lot and the community and health centers will be visible at night from the west.
31. The Applicants conducted a study of potential noise impacts from construction and operation activities at the proposed project. Background noise conditions were measured at the Murdoch residence and in the neighborhood of the other Appellants. Sources of ambient noise at these locations include traffic on Route 7 and other nearby roads, aircraft flying overhead, farm machinery, and surf on the lakeshore. Construction noise sources at the site will include chainsaws, truck traffic, and drillers. Following construction, operational noise sources at the site will include delivery trucks and trash hauling trucks. Noise levels from these sources were calculated and compared to the background readings. Noise from construction or operational activities will be barely discernible, and most likely inaudible, at the Murdoch residence and the homes of the other Appellants.
32. The Applicants' study compared noise levels without regard to atmospheric conditions, intervening topography, and vegetation. Atmospheric conditions will cause the levels of noise from the project to diminish over distance. Intervening topography and vegetation will also reduce levels of noise from the project.
33. Cumulative noise levels from project construction will not exceed background noise from farm machinery, aircraft flying overhead, lawnmowers, and other typical noise generators in the area of the proposed project.

34. To take advantage of solar heat, it is best to orient buildings toward the south. The orientation of buildings on the site is primarily dictated by the westward-sloping topography. Given the topography, buildings will be oriented toward the south to the extent practicable. Living spaces will receive the maximum amount of sunlight that can be expected in a dense wooded setting. The project will be heated by a geothermal heat pump system which derives *its* heat from the earth.
 35. Lake Champlain is a public resource used for many purposes, including swimming, boating, fishing, and aesthetic enjoyment.
 36. The area of the lake near the Town Beach experiences extensive use by recreational boaters, in particular those who **sail**.
 37. The Town Plan which was in effect at the *time* Wake Robin's application was filed is entitled "**Shelburne**, Vermont Comprehensive Plan, December 1985."
 38. The Town Plan contains several provisions relating to the density of residential development in Shelburne, including the following:
 - On page 47, Goal 1 of the Shelburne Town Plan is "[t]o preserve the small town atmosphere of Shelburne."
 - On page 47, Recommendation 1 of Goal 1 states: "**The** Town encourages development to concentrate around the Village Center with lower densities in the more remote portions of the **Town**."
 39. On page 53, Recommendation 22 of Goal 10 of the Shelburne Town Plan states: "Whenever practicable, buildings are encouraged to be located so as to take advantage of potential solar energy."
 40. On page 54, Goal 11 of the Town Plan is "[t]o preserve and protect the Town's unique and valuable lakeshore land and **resources**."
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41. The Chittenden County Regional Plan which is currently in effect is entitled "We Are Not the Last Generation," adopted December 22, 1986.
42. The Regional Plan establishes a series of land use classifications. The Wake Robin project is proposed to be built in an area classified as a "Resource Area." Concerning Resource Areas, the Regional Plan provides on page 164:

The purposes of the Resource Areas are to provide for uses which are compatible with the potential of the land for agriculture, forestry, or mineral extraction, to protect the rural character and scenic resources

IV. Conclusions of Law

A. Criterion 8 (Aesthetics, Scenic or Natural Beauty)

10 V.S.A. § 6086(a)(8) requires that, before issuing a permit, the Board find that a proposed project will not have an undue adverse effect on aesthetics or scenic or natural beauty.

The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corv., #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law, and Order at 18-19 (Jan. 13, 1986).

1. Adverse Effect

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board examines whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board looks to a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

The project's context is best examined in terms of its location on the western side of a ridge, with the land sloping down from the ridge to the shore of Lake Champlain a mile away. There is more development on the east than on the west side of the ridge, with the east side more residential and the west side more rural and agricultural. Some residential development exists on the west side and more such development has been approved. Significant background noise can be routinely heard west of the ridge, including traffic noise from Route 7 east of the ridge, farm machinery, and aircraft flying overhead. The density of structures per acre west of the ridge generally exceeds one in ten. The ridge, and the area between the ridge and the lake, form part of the view for recreational users of the lake and the Shelburne Town Beach. The project site is visible from these locations at distances of a mile or greater. The site is also visible from some residences which are almost a mile away. The population density of the town in which the project will be built is approximately half a person per acre.

The Board's memorandum of decision dated November 27, 1990 limits the consideration of aesthetics to noise and visual impacts. With respect to noise, the proposed project will not have an adverse aesthetic effect, based on Findings 31 through 33, above.

In terms of visual impacts, there are two areas of concern. First, much of the project will not be visible if the proposed forest management plan is successful. However, there are countervailing factors which jeopardize the success of the forest management plan. For example, the Applicants propose to operate machinery within ten feet of the canopy line of the tree stands that the Applicants propose to preserve. This could result in the death of those trees which are highest in elevation and therefore provide the most screening for the proposed project. Sewer line clearings may also decrease the likelihood of the plan's success by creating visible cleared areas and by allowing heavy equipment to operate within the tree stands. Further, no provision has been made for replacement of trees which die as a result of the proposed project, and no plan has been submitted to ensure that vista pruning will not undermine the management goal of preserving the screening capabilities of the surrounding forest. If the proposed forest management plan is **unsuccessful or** undermined, adverse effect is likely to **occur**

by exposing a large building complex sitting on top of a ridge to view. Such a view will be out of context in the rural area west of the ridge.

The second area of concern relates to impacts which will occur regardless of the success of the forest management plan. Viewers from the west will experience increased visibility of the project's community center because of its height, the distance between it and the edge of the closest forest stand as proposed by the Applicants, and the lowered elevation of that stand. See Findings 9 and 25, above. The possibility of tree **dieback** increases the likelihood of the center's visibility. See Findings 23 through 25, above. When foliage is off the trees, viewers from the west, including the lake and the Town Beach, also will see a glow at night from the light of the employee parking lot and the health and **community** centers. See Findings 9, 12, 15, and 30, above. Such visibility is out of context in the rural area west of the ridge.

The Appellants argue that there is a third area of concern. They assert that the density of the proposed project is out of context and therefore will have an adverse aesthetic effect. However, this aesthetics appeal has been limited specifically to consideration of noise and visual impacts. The Board has above concluded that the noise impacts of the proposed project will not be aesthetically adverse. Thus, for the Board to consider the project's density, there must be some link between density and visual impacts. The Board does not find any significant link in this case because the buildings are located and designed to be largely screened from view.

2. Undue

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with **respect** to any one of these factors, which are:

- a. Does the project violate a clear, **Written** community standard intended to preserve the aesthetics or scenic beauty of the area?

- b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?
- c. Has the Applicant failed to take generally available mitigating steps which a, reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

The Board does not reach a positive conclusion on any of these three factors. The Board begins its analysis by addressing the third factor, mitigation, because its conclusion on that factor affects its conclusions on the other factors.

With the exception of the visibility of the community center and the lighting issues noted below, the Board concludes that the Applicants have taken reasonable steps to mitigate any adverse effect which may occur, as long as the proposed forest management plan is successful and not undermined by subsequent action. The Applicants have situated the project where most of it will not be readily seen because of the surrounding forest stands and at a distance of nearly a mile from the nearest of the Appellants' residences, and of over a mile from Lake Champlain and the Shelburne Town Beach. The Applicants will implement a forest management plan to preserve surrounding vegetation and wildlife and will also implement a planting plan to supplement the existing vegetation. These measures, if they work, should serve to maintain and enhance the screening capabilities of the surrounding forest.

However, because of the significant possibility that the forest management plan will not prove successful, and because of the importance of that plan and the planting plan to the Board's findings, the Board will issue the following permit conditions to ensure the success of those plans and therefore the prevention of an undue adverse effect on aesthetics and scenic beauty:

- (a) a requirement to prepare and implement a plan, subject to District Commission approval, to replace trees which die;
- (b) a prohibition on construction activities within tree stands outside of required snowfence line locations;
- (c) a requirement to move, in two locations described below, the snowfence and clearing limit line location depicted on Exhibit #W6 ten feet closer to the proposed roads and buildings;
- (d) a requirement to install snowfencing no more than ten feet away from and on either side of the center line for construction activity in the proposed sewer line and stormwater swale clearings;
- (e) a requirement that, prior to project construction and snowfence installation, a licensed surveyor or registered engineer survey and mark required snowfence locations around the main disturbed area and the center lines of the sewer line and stormwater swale clearings;
- (f) a requirement that snowfencing remain in place throughout construction;
- (g) a requirement to hold an on-site preconstruction conference with the District Coordinator prior to any tree clearing;
- (h) a requirement to prepare a vista pruning plan which must be approved by the District **Commission** prior to any vista pruning;
- (i) requirements to plant trees in the areas proposed for sewer line clearing;
- (j) requirements to strictly comply with, and to re-examine and update the forest management plan every five years, and to incorporate that plan into all contract documents;

- (k) a requirement to strictly comply with the planting plan; and
- (l) the retention of jurisdiction by the District Commission to review aesthetics and issue further conditions as needed.

The requirement to move the proposed snowfence line in two locations is being done to prevent construction equipment from operating close to trees which will be important to screen the project from view or will provide mitigating natural background to the project. The two locations will be along the western and southeastern sides of the main disturbed area. Should this requirement cause a redesign of the employee parking lot, the Applicant will be required to submit a revised design for that lot along with a lighting plan submission for the lot which the Board will also require, as described below.

With regard to visibility of the community center, the Board concludes that further mitigation may be reasonably obtained by preserving more of the tree stand west of the community center. The consequent increased proximity of the trees to the center would reduce its off-site visibility. Accordingly, the Board will condition the permit to require that trees shall not be cleared west of the sewer line which is shown on Exhibit #W6 between the center and the forest stand west of the center, and that trees in that area shall be managed in accordance with the proposed forest management plan.

With respect to glow from the employee parking lot and the community and health centers, the Board concludes that the Applicants must be required to prepare a plan to mitigate that glow. The plan must be reviewed and approved by the District Commission prior to use of the employee parking lot and the community and health centers. The plan must also revise the lighting scheme for the parking lot to reduce night-time glow and ensure that only minimal illumination emanates from the windows on the community and health centers at night. By way of example, this standard may be achieved at the community and health centers by having mechanical shades or drapes installed in the windows of those buildings, the closing and opening of which is controlled by a timer.

Based on the mitigation proposed by the Applicants and imposed by the Board through permit condition, the Board concludes that the proposed project will not be shocking or offensive and will not violate any applicable written community standards.

On the basis of the foregoing, the Board concludes that the proposed project complies with Criterion 8.

B. Criterion 9(F) (Energy Conservation)

10 V.S.A. § 6086(a)(9)(F) provides:

A permit will be granted when it has been demonstrated by the applicant that, in addition to all other applicable criteria, the planning and design of the subdivision or development reflect the principles of energy conservation and incorporate the best available technology for efficient use or recovery of energy.

Criterion 9(F) requires two inquiries with respect to the planning and design of the proposed project: (a) whether they reflect the principles of energy conservation, and (b) whether they incorporate the best available technology for efficient use or recovery of energy.

The issue in this proceeding is limited to consideration of the solar orientation of the proposed project's buildings. The Board concludes that this issue goes toward the first inquiry, reflection of conservation principles, rather than toward the second inquiry, incorporation of technology, because siting of buildings is a conservation issue but is not a question of using technology.

The Board further concludes that the proposed project reflects the principles of energy conservation with regard to solar orientation. The proposed project is oriented to take advantage of solar heat during the winter as much as is practicable given the westward-sloping nature of the project site. See Finding 34, above.

C. Criterion 9(K) (Impact on Public Facilities)

10 V.S.A. § 6086(a)(9)(K) provides:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, *services*, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that; in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The issue in this matter is limited to the visual impacts of the proposed project on the Shelburne Town Beach and on users of Lake Champlain, which are public lands as defined by Criterion 9(K). Based on the Board's conclusions with respect to *Criterion 8*, above, including the permit conditions which the Board will issue, the Board concludes the proposed project will not endanger the public's investment in, or materially jeopardize or interfere with the public's use and enjoyment of, Lake Champlain and the Shelburne Town Beach.

D. Criterion 10 (Conformance with Local or Regional Plans)

10 V.S.A. § 6086(a)(10) provides that, before issuing a permit, the Board find that a proposed project "[i]s in conformance with any duly adopted local or regional plan "

The issues with regard to local and regional plans are limited to those sections of those plans which relate to the other criteria on appeal: 8, 9(F), and 9(K). In Section IV.A., above, the Board has already determined pursuant to Criterion 8 that the proposed project will not violate any applicable community standard. The Board has also determined

that in this case density impacts do not relate to the limited Criterion 8 review contemplated by the Board's order of November 27, 1990, and therefore it is beyond the purview of this decision to review the project's per se compliance with the density provisions of the Town Plan. Since the Board's consideration of Criterion 9(K) is limited to consideration of visual impacts, the Board's conclusion regarding community standards pursuant to Criterion 8 is also dispositive of those plan provisions which relate to Criterion 9(K). Finally, with respect to Criterion 9(F), the Town Plan encourages buildings to be located to take advantage of solar heat "[w]henever practicable." The Board has found above that the proposed project is designed to do so.

Accordingly, based on the Board's findings, its conclusions with respect to the other criteria on appeal, and the permit conditions which the Board will issue, the Board concludes that the proposed project complies with Criterion 10.

V. Permit Conditions

The Board has concluded above that permit conditions are necessary and will issue a permit containing conditions. The Board notes that several of the necessary conditions relate to matters concerning which the District Commission already, issued conditions. These include all or portions of Conditions 9 (lighting plan), 10 (landscaping plans), 18 (preconstruction conference), 19 (canopy line), 20 (update of forest management plan), 23 (vista pruning), 26 (sewer line planting), and 35 (construction completion date/retention of jurisdiction).

Of these conditions, numbers 18, 23, and 26 include language which is sufficient to implement the Board's conclusions, and therefore the Board need not modify them. Condition 9, which includes language concerning submission of a lighting plan for the employee parking lot, will be modified to require that the plan also address glow from the community and health centers in accordance with the Board's conclusions, above. condition 10, which requires "**substantial**" compliance with landscaping plans, will be revised to require implementation of the landscaping plans as submitted to the Board and the District Commission. Condition 19, which requires a snow fence to be installed ten feet outside the drip lines of all trees to be protected, will be modified and new conditions will be issued to effect the Board's intent as described in

Section **IV.A.2.**, above. **Conditon** 20, which requires an update of the forest management plan, will be revised to require strict compliance with that plan.

Further, the only argument submitted regarding permit conditions has been by the Applicants concerning Conditions 9 and 35. The Board has discussed Condition 9 above. With respect to Condition 35, the Applicants have requested that the Board amend that condition to delete a portion of it which pertains to the District Commission's retaining jurisdiction and to modify the remainder of it, which concerns the date for completion of project construction. The Board will delete that portion of Condition 35 which relates to retention of jurisdiction because retention of jurisdiction is separate from construction completion; however, in accordance with the Board's conclusions, above, the Board will issue a Separate condition regarding said jurisdiction. The Board also will extend the construction completion date to July 1, 1993 as requested.


Finally, the Board notes that the District Commission issued several permit conditions relating to Criteria 8 and 9(F) which have not been discussed above. The parties have not argued to the Board that these conditions should be modified or deleted. Moreover, the issues before the Board with regard to all criteria under appeal are more limited than those which were considered by the District Commission. Accordingly, the Board has not examined these conditions or revised or deleted any of them, and thus the Board's permit conditions should be interpreted to supplement rather than supersede any conditions issued by the District Commission which are not expressly modified by the Board.

VI. Order

Land Use Permit Amendment #4C0814-EB is hereby issued.
Jurisdiction is returned to the District #4 Environmental
Commission.

Dated at Montpelier, Vermont, this 14th day of August,
1991.

ENVIRONMENTAL BOARD



Stephen Reynes, Acting Chair
Lixi Fortna
Samuel Lloyd
William Martinez
Steve E. Wright

A dissenting opinion of Members Elizabeth Courtney,
Ferdinand Bongartz, and Charles F. Storrow is attached.
Member Courtney did not attend all hearings, but did attend
some of the hearings and the site visit, and reviewed the
record prior to deliberation.

Opinion of Elizabeth Courtney, Ferdinand **Bongartz**, and Charles F. Storrow, concurring in part and dissenting in part:

We dissent from the majority's conclusions with regard to the visual impacts of the proposed project pursuant to Criteria 8, 9(K) and 10. Otherwise, we concur with the majority's opinion.

Under the statute, as it currently exists, the Vermont Environmental Board is obliged to judge whether the Wake Robin Development is in conformance with the 1985 Shelburne, Vermont Comprehensive Plan. In this case, we have limited the issues to be considered under the plan, but we must nonetheless consider the plan as it relates to aesthetics.

We are bound to consider the plan itself. In contrast to arguments put forward by the Town of Shelburne, we are not authorized to judge whether the project conforms with the zoning regulations and we are not authorized to judge whether the project conforms with the Town staff's interpretation of its plan.

The three dissenting members of the eight members participating in this decision understand that the 1985 Shelburne plan sets forth the following significant principles:

1. That development will concentrate in the existing town center.
2. That the more remote areas of town should continue to receive lower **densities** of development.
3. That the Bostwick-Clark woods is a natural resource worthy of protection.

Comprehensive Plan at 36, 38, 47-48, 52.

We believe that these principles relate to the aesthetic issues of town planning. The overall development pattern of compact village settlement and rural countryside with the accompanying resource protection is a well established goal of many communities desiring to maintain quality scenic landscapes.

The Wake Robin project is proposed to be sited within one of the most remote areas of the Town and within the **Bostwick-Clark** woods. We also understand that the Wake Robin project is proposing 235 dwelling units on 136 acres of land, constituting an overall density of 15 times that contemplated in the plan. And that the Bostwick-Clark woods would receive more than a 36-acre clear cut in order to accommodate this new community.

We therefore conclude that the proposed project does not comply with Criteria 8, 9(K), and 10 because of its aesthetic impacts. We further note that this is only Phase I of the project, and that Phase II will be likely to significantly increase the visual and density-related impacts of the project beyond the ability of this program to authorize.

a:wake.dec(awp3)